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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a state venue law which provides that nonresident corporations may be sued in any county in the state, whereas resident corporations may be sued only in their county of residence, violates the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

Burlington Northern, Inc., is the parent company of petitioner Burlington Northern Railroad Company. The partially owned subsidiaries of petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and Northern Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Montana Venue System	3
B. The Proceedings Below	4
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE EQUAL PROTECTION CLAUSE FORBIDS DISCRIMINATION IN STATE JUDICIAL SYSTEMS AGAINST FOREIGN CORPORATIONS	9
A. The Origin And Early Development Of The Equal Protection Clause Evince A Purpose To Ensure Procedural Equality In The State Courts	9
B. The Equal Protection Clause Specifically Protects Foreign Corporations From Discrimination In State Court Venue	12
C. The *Saunders* Principle Of Equality For Foreign Corporations In State Courts Has Been Instrumental In The Subsequent Development of the Equal Protection Clause	17

TABLE OF CONTENTS—Continued

Page

II. THE MONTANA VENUE LAW'S DISCRIMINATION AGAINST FOREIGN CORPORATIONS IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE 23

A. There Is No Rational Basis In State Policy For The Discrimination By Montana Venue Law Against Foreign Corporations 23

B. Federal Law Provides No Basis For The Discrimination Effected By The Montana Venue System 27

III. THE MONTANA VENUE SYSTEM EFFECTS REAL AND SUBSTANTIAL DISCRIMINATION AGAINST FOREIGN CORPORATIONS 32

A. The Equal Protection Clause Forbids Real And Substantial Discrimination In State Court Venue 34

B. The Montana Venue System Creates Real And Substantial Litigation Disadvantages For Out-of-State Corporations 37

CONCLUSION 40

STATUTORY APPENDIX 1a

TABLE OF AUTHORITIES

CASES — Page

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 36
American Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976) ..... *passim*
Atchison, T. & S.F. Ry. v. Vosburg, 238 U.S. 56 (1915) 11
Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898 (1986) 21
Bain Peanut Co. v. Pinson, 282 U.S. 499 (1931) 16, 36
Bainbridge v. Merchants' & Miners' Transp. Co., 287 U.S. 278 (1932) 29
Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839) 25
Banning v. Minidoka Irrig. Dist., 406 P.2d 802 (Idaho 1965) 15
Barron v. Burnside, 121 U.S. 186 (1887) 29
Bevacqua v. Burlington N., Inc., 183 Mont. 237, 598 P.2d 1124 (1979) 4
Bohn v. Better Biscuits, Inc., 78 P.2d 1177 (Cal. Ct. App. 1938) 24
Burt v. Scarborough, 366 P.2d 498 (Cal. 1961) 24
Cincinnati St. Ry. v. Snell, 193 U.S. 30 (1904) 6, 13, 36
Commercial Carriers, Inc. v. Matracia, 311 S.W.2d 565 (Ky. 1958) 15
Coons v. American Honda Motor Co., 463 A.2d 921 (1983), *modified*, 476 A.2d 763 (N.J. 1984), *cert. denied*, 469 U.S. 1123 (1985) 19
Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991) 22
Equitable Life Ins. Co. of Iowa v. Pfeffer, CV 89-203-BLG-JFB, 4 Mont. Fed. Rpts. 172 (1989) 31
Foley v. General Motors Corp., 159 Mont. 469, 499 P.2d 774 (1972) 28
Forman v. Mississippi Publishers Corp., 14 So. 2d 344 (Miss. 1943) 16
Friez v. Pogatchnik, CV 89-28-BLG-JFB, 3 Mont. Fed. Rpts. 250 (1989) 31

TABLE OF AUTHORITIES—Continued

	Page
G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982)	19
General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982)	10
Gulf, Colorado & S.F. Ry. v. Ellis, 165 U.S. 150 (1897)	11
Hale v. Bohannon, 241 P.2d 4 (Cal. 1952)	16, 24
Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926)	20
Hardenburgh v. Hardenburgh, 115 Mont. 469, 146 P.2d 151 (1944)	23, 33
Harrison v. St. Louis & S.F. R.R., 232 U.S. 318 (1914)	29
Haug v. Burlington N. R.R., 236 Mont. 368, 770 P.2d 517 (1989)	3, 4
Henry Fisher Packing Co. v. Mattox, 90 S.W.2d 70 (Ky. 1936)	15
Herndon v. Chicago, R. I. & Pac. Ry., 218 U.S. 135 (1910)	29
Hess v. Pawloski, 274 U.S. 352 (1927)	18
Hill v. Atlantic Greyhound Corp., 51 S.E.2d 183 (N.C. 1949)	16
Hirsch v. Shepherd Lumber Corp., 20 S.E.2d 575 (Ga. 1942)	16
Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985)	22
Interstate Amusement Co. v. Albert, 239 U.S. 560 (1916)	17
Kane v. New Jersey, 242 U.S. 160 (1916)	18
Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923)	11, 12
Labella v. Burlington N. R.R., 182 Mont. 202, 595 P.2d 1184 (1979)	4
Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1856)	25
Leroy v. Great West. United Corp., 443 U.S. 173 (1979)	33
McAlear v. Kasak, 225 Mont. 113, 731 P.2d 908 (1987)	3

TABLE OF AUTHORITIES—Continued

	Page
McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934)	30
Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963)	7
Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580 (1935)	36
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)	14, 21
Miles v. Illinois Cent. R.R., 315 U.S. 698 (1942)	30
Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950)	30
Mitchum v. Foster, 407 U.S. 225 (1972)	10
Morgen & Oswood Constr. Co. v. United States Fidelity & Guar. Co., 167 Mont. 64, 535 P.2d 170 (1975)	28
Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939)	25
Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868)	25
Philco-Ford Corp. v. Holland, 548 S.W.2d 828 (Ark. 1977)	15
Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927)	*passim*
Powers v. Ohio, 111 S. Ct. 1364 (1991)	22
Pue v. Northern Pacific Ry., 78 Mont. 40, 252 P. 313 (1926)	25, 26
Pullman Co. v. Kansas, 216 U.S. 56 (1910)	14
Rinaldi v. Yeager, 384 U.S. 305 (1966)	22, 28
Santa Clara County v. Southern Pac. Ry., 118 U.S. 394 (1886)	10
Smith v. Utah Home Fire Ins. Co., 47 N.W.2d 785 (Minn. 1951)	16
South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster, 237 U.S. 63 (1915)	18
Southern Ry. v. Greene, 216 U.S. 400 (1910)	14, 20
Southern Ry. v. Allison, 190 U.S. 326 (1903)	29
St. Clair v. Cox, 106 U.S. 350 (1882)	17
St. Mary's Franco-Am. Petroleum Co. v. West Virginia, 203 U.S. 183 (1906)	17, 18
State ex rel. Blackledge v. Latourette, 205 P.2d 849 (Or. 1949)	16

TABLE OF AUTHORITIES—Continued

Page

State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. 1962) 15
State ex rel. Burlington N. R.R. v. Eighth Judicial Dist. Court, 229 Mont. 325, 746 P.2d 1077 (1987) 4
Terral v. Burke Constr. Co., 257 U.S. 529 (1922) .. 29
WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117 (1968) 20
Washington ex rel. Bond & Goodwin & Tucker v. Washington Superior Court, 289 U.S. 361 (1933) 18
Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981) 14, 21, 36
Western Union Tele. Co. v. Kansas, 216 U.S. 1 (1910) 14
Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949) 20
Williams v. Vermont, 472 U.S. 14 (1985) 22, 28
Windham v. Pace, 6 S.E.2d 270 (S.C. 1939) 15
Yick Wo v. Hopkins, 118 U.S. 356 (1886) 10
Zobel v. Williams, 457 U.S. 55 (1982) 22
Zolper v. AT&T Info. Sys., Inc., 709 S.W.2d 74 (Ark. 1986) 16

CONSTITUTIONS

Federal

U.S. Const. Amend. XIV, § 1 ..... *passim*

State

Ala. Const. Art. XII, § 232 16

STATUTES

Federal

28 U.S.C. § 1257(a) 2
28 U.S.C. § 1404(a) 31
42 U.S.C. § 1981 10
45 U.S.C. § 56 ..... 7, 29

TABLE OF AUTHORITIES—Continued

State	Page
Cal. Civ. Proc. Code § 395 (West 1973)	24
Me. Rev. Stat. Ann. tit. 4, § 155 (West 1989)	16
Mont. Code Ann. § 3-5-203	31
Mont. Code Ann. § 25-2-118	*passim*
Mont. Code Ann. § 25-2-122	3
Mont. Code Ann. § 25-2-201	4, 5
Mont. Code Ann. § 35-1-305	27
Mont. Code Ann. § 35-1-306	27
Mont. Code Ann. § 35-1-1012	5, 27
Mont. Code Ann. § 35-1-1013	27
Neb. Rev. Stat. § 25-403.02 (1989)	16
Or. Rev. Stat. § 14.080 (1989)	16
ACTS	
Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988)	*passim*
14 Stat. 27 (1866)	10
16 Stat. 140 (1870)	10
LEGISLATIVE MATERIALS	
93 Cong. Rec. 4034, 4040 (Mar. 31, 1910)	30
RULES	
D. Mont. R. 105-1 (1991)	31
MISCELLANEOUS	
3 Am. Jur. *Trials* § 22 (1965)	32
BNA, *Civil Trial Manual Practice Series* 21:241 (1987)	33
Horace E. Flack, *The Adoption of the Fourteenth Amendment* (1908)	10
John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980)	21
John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131 (1950)	10
R. Casad, *Jurisdiction and Forum Selection* § 2:12 (Callaghan 1988)	32

TABLE OF AUTHORITIES—Continued

Page

Recommendations For Revisions in Venue Statutes Prepared by the Montana Supreme Court Commission on the Rules of Evidence, Exhibit I to Senate Judiciary Committee Minutes of January 22, 1985 24

Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991) 32

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision and order of the Montana Supreme Court is reported at 819 P.2d 169 (1991) and is reproduced in Petitioner's Appendix ("Pet. App.") at 1a to 15a. The two unreported decisions and orders of the Yellowstone County trial courts are reproduced respectively at Pet. App. 16a and 18a.[1]

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[1] This litigation began as two separate cases, *William D. Ford v. Burlington Northern R.R.*, No. DV-89-974, and *Thomas L. Johnson v. Burlington Northern R.R.*, No. DV-89-975, both brought in

JURISDICTION

The decision and order of the Supreme Court of the State of Montana was entered on August 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTORY PROVISIONS INVOLVED

The applicable Montana venue statute, Mont. Code Ann. § 25-2-118 (1989) ("MCA"), is set forth verbatim at Pet. App. 26a. Most pertinent, subsections (1) and (2) of the statute provide:

> (1) the proper place for trial for all civil actions is the county in which the defendants or any of them reside at the commencement of the action;
>
> (2) if none of the defendants reside in the state, the proper place of trial is the county the plaintiff designates in the complaint; . . . .

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

This petition concerns the applicability of the Equal Protection Clause of the Fourteenth Amendment to discrimination in state court venue. Montana's general venue statute discriminates in a real and substantial way against out-of-state corporations, permitting suits to be filed against them in any county in the state, while tightly restricting venue against Montana corporations.

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the Montana Thirteenth Judicial District Court, Yellowstone County. Two different judges of the trial court issued two separate decisions, but those two decisions were identical in substance, and the Supreme Court of the State of Montana consolidated the cases and decided them together.

A. The Montana Venue System

The Montana venue system giving rise to this case consists of three basic elements. First, the applicable venue statute, MCA § 25-2-118, predicates selection of venue on the county of residence of the defendant. This statute was enacted in 1864 by Montana's First Territorial Legislative Assembly and has remained essentially the same since.[2] Under MCA § 25-2-118, residents of the state may be sued only in their county of residence, but non-residents may be sued in any county in the state the plaintiff chooses. Pet. App. 26a. A tort action may also be brought in the county in which the tort is alleged to have occurred. MCA § 25-2-122. Thus, in a tort case against a resident of Montana, the plaintiff will be limited to two counties if the tort was committed in the state, and is limited to only one county if it occurred outside Montana. On the other hand, for an identical case involving a non-resident defendant, the plaintiff will always have the choice of any of Montana's fifty-six counties.[3]

Second, under controlling state decisional law, an out-of-state corporation may not acquire "resident" status for purposes of the venue distinction in MCA § 25-2-118 between residents and non-residents. Even a corporation that has established a fixed place of business in the state and designated an agent for receipt of service of process in a particular county in the state cannot acquire a Mon-

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[2] MCA § 25-2-118 (1989) (originally enacted as En. Sec. 20, p. 46, Bannack Stat., 1864; amended Sec. 8, Ch. 432, L. 1985; redesignated 25-2-118 by Code Commissioner, 1985). *See* Statutory Appendix, *infra*, at 1a (quoting statute as originally enacted and as presently codified).

[3] For a brief period, tort actions against non-residents were required to be brought in the county where the tort was alleged to have occurred. *McAlear v. Kasak*, 225 Mont. 113, 731 P.2d 908 (1987). However, the Montana Supreme Court overruled itself on this point and held that a tort case against a non-resident may be brought in any county. *Haug v. Burlington N. R.R.*, 236 Mont. 368, 770 P.2d 517, 519 (1989) (citations omitted).

tana residence under the venue statute. *E.g.*, *Haug*, 770 P.2d at 519.

Third, Montana maintains an "open door" policy which permits out-of-state plaintiffs to sue in Montana state courts, even when the alleged injuries occurred outside the State.[4] The net result of this system is that out-of-state corporations may be sued anywhere in the state, either by in-state or out-of-state plaintiffs, whereas venue against Montana corporations is far more restricted.[5]

B. The Proceedings Below

BN is a corporation organized under the laws of the State of Delaware, with its principal place of business in Fort Worth, Texas. BN operates rail lines in twenty-five states, including Montana, and has its Montana headquarters and principal place of business in Hill County.[6] As required by Montana law, BN has also designated a registered agent for service of process in Montana: CT Corporation Systems, located in Helena in Lewis and

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[4] *E.g.*, *Haug*, 770 P.2d at 521 (citations omitted); *State ex rel. Burlington N. R.R. v. Eighth Judicial Dist. Court*, 229 Mont. 325, 746 P.2d 1077, 1080 (1987); *Bevacqua v. Burlington N., Inc.*, 183 Mont. 237, 598 P.2d 1124, 1125 (1979); *Labella v. Burlington N. R.R.*, 182 Mont. 202, 595 P.2d 1184, 1187 (1979).

[5] The disparity is exacerbated in actions brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988). Under Montana law, the doctrine of forum non conveniens is specifically not available to defendants in FELA actions, as it is to defendants in civil actions arising under state law. MCA § 25-2-201 (1987); *see Haug*, 770 P.2d at 521 (citations omitted). Thus, a FELA plaintiff has a unilateral and absolute right to select any Montana state court for trial of his or her case—even when the plaintiff, the site of the accident, and all of the fact witnesses are outside the state.

[6] Pet. App. 4a; JA 20-21, Affidavit of Mark C. Bruce. Hill County is in the north of Montana. Yellowstone County, where the underlying actions were brought, is in the southern part of the state, over 300 miles away.

Clark County, Montana. *See* MCA § 35-1-1012 (requiring designation of a "registered agent" for service of process).

The two underlying actions were brought against BN under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1988). In each case, process was served on BN's registered agent in Montana. JA 13-16. Each action was filed in state district court in Yellowstone County, Montana. BN has some trackage in Yellowstone County but, as noted above, its principal place of business in the State is in Hill County. In each case below, the plaintiff was a resident of Sheridan, Wyoming, and was allegedly injured while working on BN's railroad premises in Sheridan. The lead counsel for both plaintiffs was a law firm located in Colorado. Thus, the actions were brought in a selected Montana state court by out-of-state counsel, representing out-of-state plaintiffs, alleging out-of-state injuries.

In each case, BN moved for change of venue from Yellowstone County to Hill County.[7] In so moving, BN challenged the constitutionality of the Montana venue statute on equal protection grounds, claiming invidious discrimination as between domestic and out-of-state corporations. JA 17-19. BN relied principally on this Court's decision in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), which held that the Equal Protection Clause does not permit a state venue law to discriminate between domestic corporations and foreign corporations with a fixed place of business and a registered agent in the state. The Yellowstone County trial courts denied BN's venue motions, following controlling state law that "a foreign corporation has no county of residence for venue purposes and can be sued in any county selected by the plaintiff." Pet. App. 21a (citations omitted). The trial courts did not mention *Saunders*, but upheld the constitutionality

[7] Under MCA § 25-2-201(1), a change of venue is required only "when the county designated in the complaint is not the proper county . . . ."

of the venue statute, referring to "the hazardous conditions surrounding the railroad industry," and finding no disparate treatment because "[a]ll railroads incorporated in other states and doing business in Montana are treated similarly and can be sued in any county the plaintiff chooses." Pet. App. 17a, 24a.

On appeal, the Montana Supreme Court affirmed. The court declined BN's express invitation to construe the Montana venue statute so as to permit a foreign corporation with a principal place of business and a registered agent in the state to acquire a residence for purposes of venue. Pet. App. 5a-6a. The court below then turned to the constitutional issue, attributing to this Court the view that "the Fourteenth Amendment does not guarantee citizens the right to have disputes determined in one forum, as opposed to another." Pet. App. 6a (citing *Cincinnati St. Ry. v. Snell*, 193 U.S. 30, 36-37 (1904)). The court below acknowledged this Court's decision in *Saunders* holding that the Equal Protection Clause applies to matters of state court venue, but the court expressed doubt "whether *Saunders* continues to be good law." Pet. App. 11a.

The Montana Supreme Court expressly declined to address the fundamental equal protection issue: whether the Montana venue statute has "a rational basis for treating all out-of-state corporations differently from all domestic corporations . . . ." Pet. App. 9a. Nor did the court below identify any purpose in state law or policy for the statutory distinction. Instead, the court focused on a perceived federal policy which it found to be embodied in the FELA, allowing railroad workers maximum flexibility in their choice of forum, and found that this national policy offers "a justification for disparate treatment in this case . . . ." Pet. App. 11a. The decision below also found that no real discrimination arose in the operation of the Montana venue statute, because it assumed BN could have been sued in the federal district court for Montana, which sits in Yellowstone County

among other places. Pet. App. 15a.[8] BN petitioned for a writ of certiorari, which this Court granted.[9]

SUMMARY OF ARGUMENT

By its language, origin, and history, the Equal Protection Clause of the Fourteenth Amendment forbids discrimination in state judicial systems. Shortly after this Court held that the Equal Protection Clause protects the rights of corporations as well as individuals, it also held that the Clause prohibits discrimination against corporate litigants in state court systems. The development of this principle was crystallized in this Court's decision in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927). That case holds squarely that equal protection is violated by a state venue law that permits an out-of-state corporate defendant with a fixed place of business and a registered agent to be sued in any county of the state, but permits a domestic corporation to be sued only in its designated county of residence.

Under *Saunders*, a foreign corporation with a fixed place of business and a designated agent for service of process in the state must be treated in the same way as a domestic corporation. This is consistent with a host of other equal protection cases involving out-of-state corporations, holding that a state may take reasonable steps to place them on equal footing with domestic corporations, but may not then discriminate against them.

The discrimination in the Montana venue system against out-of-state corporations bears no rational basis related to a legitimate state purpose. The court below

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[8] Section 56 of the FELA provides for concurrent state and federal court jurisdiction, and permits a defendant railroad to be sued in any federal district in which it is currently doing business. 45 U.S.C. § 56 (1988).

[9] The decision below is "final" and reviewable. *See American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 n.3 (1976); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

identified no underpinning for the statute in state law or policy. Neither the 1864 statute itself, nor its negligible legislative history, suggests any specific purpose. If anything, the statute appears to have focused on individual defendants. In 1926, the Montana Supreme Court adopted the view that a foreign corporation could have no residence in the state for purposes of venue. That decision did not cite any policy at all, but rather the absence of any legislative provision modifying the already outdated common law notion that a corporation could not migrate from the jurisdiction of its creation. None of this justifies the infliction of unlimited venue on out-of-state corporations.

The only rationale for the Montana venue statute suggested by respondents and adopted by the court below is the supposedly pro-plaintiff policy of the FELA. This is an incorrect interpretation of that federal legislation, and certainly no justification for a distinction in state law between foreign and domestic corporate defendants—a discrimination that exists whether the action is based on the FELA or not. The inescapable conclusion is that the Montana venue rule has no purpose other than to disadvantage out-of-state corporations as against their domestic counterparts.

Nor can the discrimination here be dismissed as inconsequential because it is "only" related to venue. In fact, venue is often critical in civil litigation: it determines what kind of jury will be impanelled, who the judge will be, and what local law will apply. The unmistakable effect of the double standard in the Montana venue statute is to subject out-of-state corporations to a rampant form of forum shopping from which Montana corporations are officially immunized by state law. Assuming rational behavior on the part of plaintiffs' counsel, this permits plaintiffs (even out-of-state plaintiffs with out-of-state injuries) to exact a higher price from foreign corporations than they could from Montana corporate defendants.

Wide-open forum shopping is made far more acceptable politically when it is imposed solely on a selected class of out-of-state defendants, because local businesses would strongly protest such treatment. Existing equal protection precedent forbids such an abuse, and therefore it must be put to an end.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE FORBIDS DISCRIMINATION IN STATE JUDICIAL SYSTEMS AGAINST FOREIGN CORPORATIONS

This Court squarely held in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), that the Equal Protection Clause forbids discrimination in state court venue as between domestic corporations and foreign corporations with a fixed place of business and registered agent for service of process in the state. Review of the text, purpose, and development of the Equal Protection Clause reveals that *Saunders* has deep roots and a solid place in the modern constitutional order.

A. The Origin And Early Development Of The Equal Protection Clause Evince A Purpose To Ensure Procedural Equality In The State Courts

The Equal Protection Clause guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Much of the development of equal protection jurisprudence has focused on the need for equality in substantive legislation. The text of the clause, however, speaks not of "protection of equal laws" but of "equal protection of the laws." This language evinces a core purpose of the Fourteenth Amendment: to ensure the equality of justice in the state court systems.

The origin and early development of the Equal Protection Clause confirm that one of its main purposes was to eliminate the operation of double standards in state

courts. The text of the clause was based largely on the Civil Rights Act of 1866, which was specifically targeted to annul the post-Civil War Black Codes that imposed numerous disabilities on freedmen in state court proceedings.[10] Thus, section 1 of that Act guaranteed all citizens "the same right . . . to *sue, be parties, and give evidence* . . . and to *full and equal benefit of all laws and proceedings*. . . ."[11] The Equal Protection Clause adopted both the concepts and language of this legislation. The legislative history of Section 1 of the Civil Rights Act of 1871 provides further confirmation that a primary purpose of the Fourteenth Amendment was to end discrimination in the state court systems. *E.g., Mitchum v. Foster*, 407 U.S. 225, 240 (1972).[12]

In the years after its ratification, the Equal Protection Clause became established as a vital constitutional check on discrimination against foreign corporations within state court systems. In *Santa Clara County v. Southern Pac. Ry.*, 118 U.S. 394, 396 (1886), this Court held that the Clause applies to corporations as well as to individuals.[13] Shortly thereafter, this Court invoked the Equal

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[10] *See* Horace E. Flack, *The Adoption of the Fourteenth Amendment* 20 (1908); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131, 145 (1950).

[11] 14 Stat. 27 (1866) (emphasis added). In 1870, Congress reenacted a portion of the Civil Rights Act of 1866 pursuant to the power conferred by § 5 of the Fourteenth Amendment. 16 Stat. 140. The reenactment contains essentially the language that now appears in 42 U.S.C. § 1981 (1988). *See generally General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 386-87 (1982).

[12] During the debates on the Civil Rights Act of 1871, Senator Osborn, for example, remarked that " 'We are driven by existing facts to provide for the several states in the South what they have been unable to fully provide for themselves; *i.e.*, the full and complete administration of justice in the courts.' " *Id.* at 240-41 (quoting Cong. Globe, 42d Cong., 1st Sess. 653 (1871)).

[13] In the same year, the Court decided *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In that case, a facially neutral ordinance re-

Protection Clause to assure the fairness of state court proceedings for corporate defendants. In two cases, the Court held that an attorneys fees remedy cannot be imposed in state court on railroads when it is not imposed on other litigants in similar circumstances. *Atchison, T. & S.F. Ry. v. Vosburg*, 238 U.S. 56 (1915); *Gulf, Colorado & S.F. Ry. v. Ellis*, 165 U.S. 150 (1897). These cases focused directly on the need for equality in ground rules for resolving disputes in the state courts:

> [The railroads] cannot appeal to the courts as other litigants under like conditions and with like protection. . . . They do not enter the courts upon equal terms . . . . In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection.

Gulf, Colorado & S.F. Ry. v. Ellis, 165 U.S. at 153.

A few years later, the Court recognized that foreign corporations could not receive discriminatory treatment in the state courts in violation of the Equal Protection Clause. In *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544 (1923), the Court invalidated a state law that imposed a more onerous burden on foreign corporations than on other litigants, including domestic corporations, with respect to the geography and logistics of discovery. Under the Wisconsin statute there at issue, a party that was a foreign corporation could be compelled to have its officer travel to any in-state location selected by its opponent in order to attend a deposition, whereas a domestic corporation or an individual could require the deposition to be taken at its own county of residence. *Id.* at 548-49. This Court rejected the view of

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quired "special permission" from a Board for certain kinds of laundries. In fact, permission was always denied to Chinese applicants, but not to other applicants. The Court found an Equal Protection violation, thus confirming that the Equal Protection Clause assured fairness in the *administration* of the laws.

the court below that discrimination against the foreign corporation was permissible:

> No doubt a corporation of one State seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like . . . but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations.

Id. at 551. Thus, the Fourteenth Amendment assured all litigants who appear in the state courts—whether individual or corporate, domestic or foreign—that they would receive equal justice.

B. The Equal Protection Clause Specifically Protects Foreign Corporations From Discrimination In State Court Venue

The precise question at issue in this case—whether the Equal Protection Clause is violated by a state law providing broader venue for suits against foreign corporations than domestic corporations—was decided by this Court in 1927 in *Power Mfg. Co. v. Saunders*, 274 U.S. 490. In that case, this Court squarely held that a state could not distinguish for venue purposes between a domestic corporation and a foreign corporation with a fixed place of business and a registered agent for service of process in the state.

In *Saunders*, a domestic corporation in Arkansas could be sued only where it had a place of business or where its chief officer resided, but a foreign corporation could be sued in any county in the state. 274 U.S. at 492-93. The defendant, an Ohio corporation, conducted business in the state solely in Arkansas County, where it maintained a warehouse and had a designated agent for service of process. *Id.* at 491. When injured in the de-

fendant's warehouse, the plaintiff sued elsewhere, in Saline County. *Id.*

The *Saunders* Court directly addressed the question whether equal protection applies to discrimination in state court venue. An earlier case, *Cincinnati St. Ry. v. Snell*, 193 U.S. 30, 36-37 (1904), had upheld a state venue law against equal protection challenge. The statute in *Snell* permitted an individual to obtain a transfer of venue under specified circumstances indicating the possibility of jury bias in favor of a corporation with its principal place of business in the county, but provided no opportunity for transfer at the request of the corporation. *Id.* at 34.[14] The *Saunders* Court categorically rejected the proposition, which had been urged on the basis of *Snell*, that venue rights are "beyond the reach of the equal protection clause," and held that *Snell* was simply a case in which the particular legislative classification had a rational and legitimate basis. 274 U.S. at 495-96.

In *Saunders*, the Court found that there was "real and substantial" discrimination because the Arkansas statute made a foreign corporation subject to suit "not merely in that county [of its place of business within the state], but in any of the 74 other counties" in the state, whereas domestic corporations enjoyed advantageously confined venue. 274 U.S. at 493. The Court then pronounced that

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[14] Specifically, the statute in *Snell* provided:

> When a corporation having more than fifty stockholders is a party in action pending in a county in which the corporation keeps its principal office, or transacts its principal business if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties.

Id. at 34. The decision upholding this statutory provision—which was plainly designed to eliminate the prejudice arising from a venue favorable to a local corporation—provides no support for a state law allowing plaintiffs broader venue in which to find a forum prejudicial to a foreign corporation.

such venue discrimination against out-of-state corporations could be permitted only if "based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation." *Id.* at 493 (citations omitted).

The *Saunders* Court posed the case as one involving "foreign corporations doing business within the state by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served." *Id.* at 494. The Court recognized that "considerations of convenience and economy" might well motivate the restriction of venue for domestic corporations, but concluded that "these considerations have equal application to foreign corporations." *Id.* Therefore, the Court found no rational basis for the Arkansas statute, and struck it down, stating that "there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or natural person." *Id.*

Justice Holmes, joined by Justice Brandeis, dissented. Justice Holmes did not disagree with the majority's treatment of *Snell* or with its conclusion that the Equal Protection Clause could protect against discrimination in state venue rules. Rather, he reasoned that, in view of the state's power to exclude foreign corporations from its borders, it could force the corporation to agree to give up its constitutional right to equal treatment. 274 U.S. at 497-98. This concept of the state's exclusion power had largely been discarded by the time of the *Saunders* decision,[15] and has been decisively rejected since.[16]

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[15] *E.g., Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910); *Pullman Co. v. Kansas*, 216 U.S. 56 (1910); *Southern Ry. v. Greene*, 216 U.S. 400 (1910). Justice Holmes dissented in each of these cases.

[16] *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. at 656-68. *See also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 874-75 (1985).

Justice Holmes also reasoned that a foreign corporation "having its works elsewhere" would not be incrementally inconvenienced by setting venue in one county rather than another. 274 U.S. at 498. The majority, however, noted that the defendant foreign corporation had a "fixed place of business" in the state. *Id.* at 494. As the majority pointed out, Justice Holmes' observation did not apply to the defendant in that case, nor to other corporations with a fixed place of business and a resident agent:

> We speak only of them. So far as their situation has any pertinence to the venue of transitory actions, it is not distinguishable from that of domestic corporations and individuals.

Id. at 494. Thus, *Saunders* established a rule of simple equality in state court venue as between domestic corporations and foreign corporations with a registered agent and fixed place of business within the state.

In the years following *Saunders*, most states have come into compliance with this rule. Several statutes similar to Montana's have been struck down on equal protection grounds and on the authority of *Saunders*.[17] A number of other states have achieved constitutional compliance through statutory construction. The supreme courts of these states have interpreted statutes that establish broader venue for non-residents than for residents to permit an out-of-state corporation to acquire residence by maintaining a place of business in the state and designating an agent for service of process, thus eliminating any inequality in practice.[18] Similarly, a few states with

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[17] *Philco-Ford Corp. v. Holland*, 548 S.W.2d 828, 829 (Ark. 1977) (venue statute discriminating between domestic and foreign corporate defendants in contract actions); *Windham v. Pace*, 6 S.E.2d 270 (S.C. 1939) (domestic versus foreign motor carrier corporations); *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70 (Ky. 1936) (same).

[18] *Banning v. Minidoka Irrig. Dist.*, 406 P.2d 802 (Idaho 1965); *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. 1962); *Com-*

such venue statutes have provided by statute that an out-of-state corporation may acquire a residence in the state for purposes of state court venue.[19] Many states, of course, simply do not have venue statutes that authorize broader venue for non-residents. Thus, with few exceptions, the *Saunders* principle has been incorporated into the law of states across the nation.[20]

Contrary to the Montana court's belief, subsequent decisions of this Court have in no way undermined the clear holding of *Saunders*. To be sure, other particular venue distinctions—such as between individuals and corporations—have been found to have a rational basis,[21] and minor variations between foreign and domestic corporations have been upheld when they are shown to have no real discriminatory effect. *See, e.g., American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976), discussed *infra* at 34-36. But the core conclusion of *Saunders*—

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mercial Carriers, Inc. v. Matracia, 311 S.W.2d 565 (Ky. 1958); *Hale v. Bohannon*, 241 P.2d 4 (Cal. 1952) (en banc); *Smith v. Utah Home Fire Ins. Co.*, 47 N.W.2d 785 (Minn. 1951); *Hill v. Atlantic Greyhound Corp.*, 51 S.E.2d 183 (N.C. 1949); *Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344 (Miss. 1943); *Hirsch v. Shepherd Lumber Corp.*, 20 S.E.2d 575 (Ga. 1942); *see also Zolper v. AT&T Info. Sys., Inc.*, 709 S.W.2d 74 (Ark. 1986) (different statute than the one in *Saunders*).

[19] *See* Me. Rev. Stat. Ann. tit. 4, § 155 (West 1989); Neb. Rev. Stat. § 25-403.02 (1989); Or. Rev. Stat. § 14.080 (1989). One state has achieved the same result by a constitutional amendment providing that a foreign corporation may be sued only in those counties where such a suit would be allowed if it were a domestic corporation. Ala. Const. Art. XII, § 232.

[20] In *State ex rel. Blackledge v. Latourette*, 205 P.2d 849, 850, 856 (Or. 1949), the Oregon Supreme Court upheld the constitutionality of a statute establishing broader venue for non-residents than for residents, as applied to a foreign corporation that did *not* have a fixed place of business in the state. That statute has since been amended to eliminate the disparate treatment. *See supra*, at 16 n.19.

[21] *See Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931).

that there is no rational basis for a difference between domestic corporations and foreign corporations with a registered agent and fixed place of business in the state—has remained solidly in effect.

C. The *Saunders* Principle Of Equality For Foreign Corporations In State Courts Has Been Instrumental In The Subsequent Development of the Equal Protection Clause

Saunders established that foreign corporations having a fixed place of business and a registered agent must be treated like domestic corporations for purposes of state court venue. This principle fits snugly into a broader body of law concerning equal protection for out-of-state corporations. This Court has permitted reasonable state regulation of foreign corporations designed to give them the functional attributes of domestic corporations, so that foreign corporations would be equally amenable to service of process and execution of judgments in state court litigation. Once an out-of-state corporation has been "domesticated" in this way, though, the case law has required it to be treated equally.

Initially, foreign corporations were viewed as having no legal existence outside of the state in which they were chartered. *See St. Clair v. Cox*, 106 U.S. 350, 354 (1882). As interstate activity by corporations became more common, this Court's decisions enabled the states to put foreign corporations on an equal plane with domestic corporations for purposes of litigation. For example, a state could require that the foreign corporation file copies of its charter with the state as a condition precedent to suing in the state's courts. *Interstate Amusement Co. v. Albert*, 239 U.S. 560, 567-68 (1916). A state could also require a foreign corporation or domestic corporation lacking a principal office within the state to appoint the state auditor as an agent. *St. Mary's Franco-Am. Petroleum Co. v. West Virginia*, 203 U.S. 183 (1906). The Court explained:

> In this instance [the statute] put all nonresident domestic corporations, which elected to have their places of business and works outside of the State, and all foreign corporations coming into the State, on the same footing in respect of the service of process, and the law operated on all these alike.

Id. at 191.[22] Similarly, foreign insurance corporations with fewer assets in the state could be required to post higher levels of security to assure equivalent potential for satisfaction of judgments. *South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster*, 237 U.S. 63, 73-74 (1915). Even foreign corporations that left the state remained subject to the requirement of an appointed agent. *Washington ex rel. Bond & Goodwin & Tucker v. Washington Superior Court*, 289 U.S. 361, 364-65 (1933) (citing *Saunders*).

Having taken these steps to assure equivalent amenability to process and execution, however, the Court refused to allow discrimination against foreign corporations in venue provisions. Thus, in *Saunders*, the Court explained:

> No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classifi-

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[22] *Accord Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (statute appointing registrar as agent for service of process on nonresident motorists "makes no hostile discrimination against nonresidents but tends to put them on the same footing as residents"); *Kane v. New Jersey*, 242 U.S. 160, 167 (1916) (similar statute does not violate equal protection because it "puts nonresident owners upon an equality with resident owners").

> cation must rest on differences pertinent to the subject in respect of which the classification is made.

274 U.S. at 494. In a legal universe that required foreign corporations to assume the essential attributes of domestic corporations, the Court could see no pertinent differences, for purposes of venue, between a domestic corporation and a foreign corporation with a fixed place of business and a registered agent. In short, once the incidents of domestication have been imposed upon a foreign corporation with respect to judicial proceedings, further unequal impositions are unconstitutional.

A more recent case confirms this analysis. In *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), the Court upheld against an equal protection challenge a state law that tolled the statute of limitations only for actions against foreign corporations that did not designate registered agents for service of process in the state. *Id.* at 412-14.[23] In its decision, the Court stressed the differences between an "unrepresented foreign corporation"—which "remains potentially difficult to locate"—and "a corporation with [an in-state] representative." *Id.* at 410. The Court thus equated a domestic corporation and a foreign corporation with a representative for service of process in the state, and drew a clear distinction between such corporations and a foreign corporation without a representative in the state. This line of demarcation is the logical implementation of the "domestication" concept at work in the earlier case law. Reading *Saunders* and *G.D. Searle* together, it is clear that the constitutionally defensible distinction is between "domesticated" and

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[23] The Court remanded the case for further review under the Commerce Clause, but before the federal district court could rule on remand, the New Jersey Supreme Court declared the statute unconstitutional under the Commerce Clause. *Coons v. American Honda Motor Co.*, 463 A.2d 921 (1983), *modified*, 476 A.2d 763 (N.J. 1984), *cert. denied*, 469 U.S. 1123 (1985).

"undomesticated" foreign corporations—not between all domestic corporations and all foreign corporations.

In other equal protection cases involving the taxation and regulation of out-of-state corporations, a parallel approach has evolved. Indeed, the domestication principle recognized in *Saunders* has been instrumental in equal protection analysis in these other contexts. The year before *Saunders*, the Court struck a statute that imposed a tax on the net local receipts of foreign corporations at a higher rate than for domestic corporations, explaining that:

> [A] line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State, and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay, to become a *quasi* citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but, after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind.

Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 510-11 (1926); *see Southern Ry. v. Greene*, 216 U.S. 400, 418 (1910).

In *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), the Court invalidated another special tax on foreign corporations, citing *Hanover* and *Saunders* together for the proposition that "[a]fter a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny . . . ." *Id.* at 571-72. Likewise, in *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117

(1968), the Court struck down a state law granting a property tax exemption to domestic nonprofit corporations but denying the exemption to foreign nonprofit corporations, and repeated the above-quoted statement from *Wheeling*. *Id.* at 119-20.

Even when the Court upheld a California "retaliatory" tax statute (one that imposed an additional burden on foreign insurers whose states of incorporation imposed higher taxes on California insurers), it reviewed and reaffirmed the entire preceding line of cases, including *Saunders*. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 662-68 (1981). And this Court applied this body of law in holding that a state law imposing a higher gross premiums tax rate on foreign insurance companies than on domestic insurance companies has a purpose violative of equal protection. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985).

The foregoing cases have arisen in contexts where there is arguably more room for line-drawing than in judicial processes. Nonetheless, the Court has invalidated incremental taxes or regulatory burdens imposed on out-of-state corporations—either because the justification for disparate treatment was not substantial, or because a purpose to discriminate against non-residents could be identified. The Court's action has been fully appropriate: a non-resident is a prime example of someone whose interests should not be entrusted solely to the political processes and value judgments of a state legislature.[24]

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[24] *See* John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* 82-84 (1980). Indeed, the Court has found a lack of equal protection in state laws which effect disparate treatment as between long-time residents and relative newcomers, even though these newcomers have at least formal access to state legislatures. *See, e.g., Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898,

This case, of course, does not arise in a tax or regulatory context, but raises a fundamental question of fairness in a state judicial system. Recent equal protection decisions of this Court have emphasized that discrimination in the legal process itself is even more serious than the type of discrimination which may result from arbitrary line-drawing in substantive legislation. As this Court observed in another equal protection context just last Term:

> [T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds.[25]

The courts, state courts included, are expected to serve as the instruments of substantive justice and as the protectors of constitutional rights. Discrimination at the courthouse door opens up the possibility of myriad other forms of bias, perhaps subtler but no less real.

Thus, as recognized by the framers of the Equal Protection Clause, inequality in the judicial process—more than in any other branch of government—has a corrosive effect on the rule of law. *Saunders* is an integral part of

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911-12 (1986); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623-24 (1985); *Williams v. Vermont*, 472 U.S. 14, 23, 27 (1985); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982).

[25] *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991) (declaring unconstitutional on equal protection grounds racially discriminatory use of peremptory jury strikes in civil litigation). This Court also declared last Term that "[t]he Fourteenth Amendment's mandate that race discrimination be eliminated from all acts and proceedings of the State is *most compelling in the judicial system*." *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991) (emphasis added) (race-based use of peremptory jury strikes in criminal case violates equal protection); *see also Rinaldi v. Yeager*, 384 U.S. 305, 309-10 (1966) (unconstitutional to require reimbursement for cost of trial transcript only from unsuccessful imprisoned defendants; all appellants are entitled to "open and equal access to the courts").

an enduring whole, and remains the controlling authority in this case.

II. THE MONTANA VENUE LAW'S DISCRIMINATION AGAINST FOREIGN CORPORATIONS IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE

In the court below, no one proffered in support of the Montana law any rational basis grounded in a legitimate state policy objective. The Montana Supreme Court expressly avoided addressing whether the law has "a rational basis for treating all out-of-state corporations differently from all domestic corporations . . . ." Pet. App. 9a. Respondents, though relying on the FELA, have acknowledged:

> It is questionable whether or not MCA § 25-2-118 could pass constitutional muster for the manner in which it distinguishes between residents and non-residents in an ordinary transitory action.

Respondents' Brief in Opposition to Petition at 2. This is a candid admission but not an unwarranted one. The Montana venue rule that compels all foreign corporations to defend suits anywhere in the state has no rational basis.

A. There Is No Rational Basis In State Policy For The Discrimination By Montana Venue Law Against Foreign Corporations

The applicable Montana venue statute expresses no particular purpose and bears no meaningful legislative history. The statute was originally enacted in 1864, when Montana became a territory and before passage of the Fourteenth Amendment. *See* Statutory Appendix, *infra* at 1a (quoting original statute). There is no legislative history that reveals a purpose for the original version of the any-county rule of venue against non-residents.[26]

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[26] What is known about the Montana statute is simply that it was borrowed from California. *See Hardenburgh v. Hardenburgh*, 115

That rule was re-enacted several times in essentially the same form, and in 1985 it was recodified.[27] At no point during its history was any purpose for the distinctive treatment of foreign corporations identified.

In fact, the different treatment given to foreign corporations under the Montana venue statute does not appear to have resulted from any consideration of state policies, but from the absence of policy. The Montana Supreme Court could find no legislative guidance at all on the subject. That court therefore mechanically applied to the venue statute, which did not mention corporations, a nineteenth-century concept of foreign corporations that was not adapted to venue.

The Montana venue statute adopted in 1864 did not specifically address corporations, and may not even have been formulated with corporations in mind. At that time, Montana did not have a generic corporation statute or any general statute dealing with foreign corporations. The venue statute certainly did not prescribe any rule for determining the "residence" of a foreign corporation.

Mont. 469, 146 P.2d 151 (1944). The California provision had been adopted in 1851, *Burt v. Scarborough*, 366 P.2d 498, 500 (Cal. 1961), and allowed suit against non-residents in any county, but residents could only be sued in their place of residence. *See* Cal. Civ. Proc. Code § 395 (West 1973). The California statute has been interpreted to satisfy equal protection. After this Court's decision in *Saunders*, the California courts held that foreign corporations who registered to do business in California would have a residence in the state for venue purposes. *Hale v. Bohannon*, 241 P.2d 4 (Cal. 1952); *Bohn v. Better Biscuits, Inc.*, 78 P.2d 1177 (Cal. Ct. App. 1938).

[27] Without changing the substance, the 1985 revision rearranged the order of the venue statute, incorporated rules which had been "declared" by the Montana Supreme Court, and settled "ambiguities" inherent in the outdated language. *See* "Recommendations for Revisions in Venue Statutes Prepared by the Montana Supreme Court Commission on the Rules of Evidence," Exhibit 1 to the Montana State Senate Judiciary Committee Minutes of January 22, 1985.

The absence of any separate rule for foreign corporations is not surprising, for the states were just beginning to wrestle with the problem of how a corporation could be sued as a legal entity outside the jurisdiction in which it was chartered. The then-prevalent belief was that a corporation could exist only in the jurisdiction of its creation—that it could have no legal "life" elsewhere.[28] As Justice Frankfurter explained in *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939):

> The classic doctrine was that a corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty.' Logically applied, this theory of non-migration prevented suit in a non-chartering state, for the corporation could not be there. And such was the practice of the circuit courts until the opinion of Chief Justice Waite in *Ex parte Schollenberger* [96 U.S. 369, 377 (1878)], displaced metaphor with common sense.

Id. at 169 (citation omitted) (footnote omitted).

As far as can be determined, the Montana Supreme Court did not confront the problem of determining venue for a foreign corporation until its decision in *Pue v. Northern Pacific Ry.*, 78 Mont. 40, 252 P. 313 (1926). The foreign corporation in that case had, pursuant to Montana statute, designated its principal place of business in Montana and a person upon whom process could be served. However, the court ruled that the foreign cor-

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[28] *E.g., Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1868) (absent recognition by other states, the corporation, "being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created"); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1856) ("This corporation, existing only by virtue of a law of Indiana, cannot be deemed to pass personally beyond the limits of that State"); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839) ("a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created").

poration lacked a residence in the state and could therefore be sued in any county. The court referred to already outdated doctrine:

> At common law, a corporation could not migrate from the state of its creation and was incapable of being "found," for the purpose of service, in any other state and therefore its ability to be sued outside its native state depends entirely upon the written law of such other state . . . .

252 P. at 314-15. The Montana Supreme Court noted that, despite the legal recognition accorded to foreign corporations and the statutory steps taken to give them the legal attributes of domestic corporations, the legislature had made no specific provision with respect to their residence for purposes of venue:

> [E]ven though by statute a foreign corporation is deemed and taken to be a domestic corporation for the purposes of jurisdiction . . . , and subject to all the duties and liabilities, and is accorded all the privileges of a domestic corporation and may sue and be sued in the courts of this state . . . , unless it is given a domestic residence by some statutory provision, it remains a nonresident of the state and comes within the provision that such person may be sued in any county of the state.

Id. at 315 (statutory citations omitted). Lacking any statutory provision specifying a separate residence, the court felt compelled to apply the older concept of a corporation:

> As we have no provision taking foreign corporations out of the general rule above, it follows that the court in which the action was commenced acquired jurisdiction to try it, if proper service of summons was had.

Id.

The Montana court thus pointed to no state policy to justify this result, but merely concluded that it was

dictated by the failure of the legislature ever to enact a statute modifying the nineteenth century concept so as to give the foreign corporation an identifiable "residence" in the state. No Montana decision since *Pue* has sought to identify a rational basis for subjecting all foreign corporations to suits throughout the state. Accordingly, even at the time of its adoption, the Montana distinction between foreign and domestic corporations had no rational basis, but resulted from a mechanical throwback to an already discredited concept.

One year later, this Court decided *Saunders*. What was true in *Saunders* over sixty years ago is even truer in today's world of multistate corporations: "there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or natural person." *Saunders*, 274 U.S. at 494. The Montana Code now imposes the same requirements of appointment and maintenance of a registered office and registered agent for service of process on foreign corporations as apply to domestic corporations. *Compare* MCA §§ 35-1-1012, 35-1-1013 *and* MCA §§ 35-1-305, 35-1-306 (1989). The institution of a suit against a domestic corporation in Montana is no different from the institution of a suit against a foreign corporation with a fixed place of business and a registered agent. Thus the disparate treatment of such foreign corporations in Montana venue law is a classic case of a law without any rational basis.

B. Federal Law Provides No Basis For The Discrimination Effected By The Montana Venue System

Not surprisingly, the Montana Supreme Court did not even hazard a "rational basis" in state policy for the statutory discrimination against out-of-state corporations. Instead, the court below concentrated on what it found to be the pro-plaintiff policy of the FELA, particularly with respect to the choice of forum. Pet. App. 9a. That

approach was entirely misdirected, for a number of reasons.

Most important, the FELA is not the subject of this case, and it is being raised only to mask the real issue. MCA § 25-2-118 is applicable to a whole range of civil cases, not only FELA cases. Prior decisions of the Montana Supreme Court have applied the statute to out-of-state corporate defendants in non-FELA actions.[29] The disparate treatment sanctioned by the Montana statute is not one of plaintiffs versus defendants, or employees versus railroads: it is of domestic corporations versus out-of-state corporations. Thus, under the Montana venue statute, a FELA suit against a railroad that is a domestic Montana corporation could be filed only in the railroad's county of residence (or in the county of the accident if in Montana), while an identical suit against BN could be brought in any county.[30] The district court below missed the point when it rejected the equal protection argument on the grounds that "[a]ll railroads *incorporated in other states* and doing business in Montana are treated similarly and can be sued in any county the plaintiff chooses." Pet. App. 17a, 24a (emphasis added).[31]

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[29] *See, e.g., Morgen & Oswood Constr. Co. v. United States Fidelity & Guar. Co.*, 167 Mont. 64, 535 P.2d 170 (1975); *Foley v. General Motors Corp.*, 159 Mont. 469, 499 P.2d 774 (1972).

[30] This is not a hypothetical example. There are several railroads incorporated in Montana: Central Montana Railway, Montana Rail Link, Rarus Railway, and Red River Valley & Western. The first three have their principal place of business in Montana, the last in North Dakota.

[31] This Court specifically rejected this form of sophistry in *Williams v. Vermont*, 472 U.S. at 27 ("A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated"), and in *Rinaldi v. Yeager*, 384 U.S. at 308 ("The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes.").

In any event, the FELA itself provides no support for discrimination in venue against out-of-state railroads. The FELA provides for broad, though not unlimited, venue in the federal courts: "in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56 (1988). But that provision does not offer broader venue against some railroad defendants than others when actions are brought in federal court. Furthermore, the broad venue permitted with respect to FELA actions in the federal courts is consistent with the historical role of these courts in protecting the rights of foreign corporations. The federal courts have always been viewed as the refuge of out-of-state defendants. The U.S. Reports at the time of the FELA's enactment were filled with cases arising from attempts by states to deny foreign corporations access to federal courts.[32] Thus, it is not surprising that Congress gave FELA plaintiffs a broad choice of venue with respect to *federal* courts.

The FELA did not, however, prescribe such a rule for state courts. As this Court has observed in the closely analogous Jones Act context, "we should be slow to impute to Congress an intention, if it has the power, to interfere with the statutory provisions of the various states fixing the venue of their own courts." *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 280-81 (1932). This Court has held that state court actions against FELA defendants must be governed by the same venue rules as all other actions in the state courts, not

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[32] *See, e.g., Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *Harrison v. St. Louis & S.F. R.R.*, 232 U.S. 318 (1914); *Herndon v. Chicago, R. I. & Pac. Ry.*, 218 U.S. 135 (1910); *Southern Ry. v. Allison*, 190 U.S. 326 (1903); *Barron v. Burnside*, 121 U.S. 186 (1887).

singled out for different treatment. *See Miles v. Illinois Cent. R.R.*, 315 U.S. 698, 703 (1942). Indeed, a state cannot discriminate between actions arising under a federal law, such as the FELA, and actions arising under state laws. *See Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950) (forum non conveniens); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 234 (1934) (jurisdiction).[33] By providing for concurrent jurisdiction in the state courts, the FELA did not sanction arbitrary discrimination against out-of-state railroad defendants. Moreover, as this Court stated in *Saunders*: "It of course rests with the state to prescribe the venue of actions brought in her courts. But the exercise of this power, as of all others, must be in keeping with the limitations which the Constitution of the United States places on state action." 274 U.S. at 495.[34]

The Montana Supreme Court also concluded, as an adjunct to its main FELA argument, that the Montana venue statute is "nondiscriminatory in its operation" because the actions could have been brought in a federal district court sitting in Yellowstone County—that is, in the same locale in which the underlying cases were brought in state district court. Pet. App. 15a. But this assumes that the case would necessarily be tried in the

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[33] Although the issue is not presented in this case, the Montana rule that forum non conveniens is categorically unavailable in FELA cases, *see supra* at 4 n.5, violates the *Mayfield-McKnett* principle and equal protection.

[34] The legislative history of the FELA is of no more help to the Montana venue statute. The invocation by the court below of the "Jennings Bill" is empty. The Jennings bill was not "rejected" by either house of Congress: the House approved the bill, but the Senate never debated or voted on it. In these circumstances, no inference about "legislative intent" can be drawn. In addition, the quotation by the court below of Senator Borah refers to the *federal* court venue provisions of the statute, and is therefore irrelevant for the reasons given above. *See* 93 Cong. Rec. 4034, 4040 (Mar. 31, 1910).

federal district court in Billings. In fact, there is a reasonable possibility that cases such as the two below—in which the plaintiffs are Wyoming residents and the accidents occurred in Wyoming—would be transferred to the federal district court in Wyoming pursuant to 28 U.S.C. § 1404(a).[35]

Even if an action could have remained in the federal court in Billings, respondents' argument is still flawed in its unspoken premise that there is no substantial difference between federal and state court. The federal court system was designed to minimize the effects of local bias against out-of-state defendants, and contains specific safeguards in that respect. Unlike Montana state court judges, who are elected locally for a fixed six-year term of office, MCA § 3-5-203, federal judges are appointed for life by the President subject to the advice and consent of the Senate. The jury in federal court is also reflective of a wider geographic region. In the Yellowstone County state trial court, the jury venire is limited to Yellowstone County itself. In contrast, the jury venire for the Billings Division of the United States District Court for the District of Montana is drawn from Yellowstone and twenty-six other nearby counties. D. Mont. R. 105-1 (1991). In addition, a defendant in federal court has the right of appeal to the United States Court of Appeals for the Ninth Circuit, rather than to the Montana Supreme Court (whose

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[35] Under 28 U.S.C. § 1404(a) (1988), a district court may transfer venue to any district where the action may have been brought for the convenience of the parties and the witnesses in the interest of justice. Federal courts in the district of Montana have granted motions to transfer under § 1404(a) to districts outside Montana in many instances. Among the factors considered in granting these motions were which forum had a greater connection to the lawsuit, the location of the defendants, witnesses and evidence, and public interest concerns such as court congestion. *See, e.g., Equitable Life Ins. Co. of Iowa v. Pfeffer*, CV 89-203-BLG-JFB, 4 Mont. Fed. Rpts. 172 (1989); *Friez v. Pogatchnik*, CV 89-28-BLG-JFB, 3 Mont. Fed. Rpts. 250 (1989).

justices are also elected). Thus, the coincidence of concurrent federal jurisdiction does not diminish the prejudice experienced by BN as an out-of-state corporation defending itself within the Montana state judicial system.

In sum, no meaningful rationale has been supplied for the blatant discrimination against out-of-state corporations in the Montana venue system. This resounding silence provides ample confirmation that the statute represents nothing more than arbitrary and indefensible localism.

III. THE MONTANA VENUE SYSTEM EFFECTS REAL AND SUBSTANTIAL DISCRIMINATION AGAINST FOREIGN CORPORATIONS

The Montana Supreme Court plainly viewed venue as a relatively insignificant matter, unworthy of constitutional protection. This is a dangerous misconception. In fact, selection of the forum of a case can have a great effect on its outcome. The dynamics of forum shopping and venue selection are obvious:

> [A]ny lawyer [knows] that the intangibles of personnel and procedure [can] tip the balance in many a case. . . . American lawyers have long known how to take a defendant with statewide operations to the right county and city; thus do rural complaints against Illinois railroads get filed in Chicago to avoid the stingy juries often found downstate.

Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit*, 82-83 (1991). The most elemental trial practice guides emphasize the importance of careful forum selection: "Experienced attorneys are well aware of the practical significance of the place of trial. . . . Juries in some areas develop reputations for being 'plaintiff minded,' or 'defendant-minded.'" [36] Or, as one authority puts it:

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[36] 3 Am. Jur. *Trials* § 22, at 707-08 (1965); *see also, e.g.*, R. Casad, *Jurisdiction and Forum Selection* § 2:12, at 15 (Callaghan

"The decision [where to sue]—which can affect such factors as the evidence that may be admitted, the length of delay until trial, the cost of the litigation, and the amount of judicial tolerance that will be exercised—may decide the outcome of the case." BNA, *Civil Trial Manual Practice Series* 21:241, at 11-12 (1987).

Indeed, the very existence of venue statutes, their detail, and the balancing of values inherent in them, all proclaim the importance of venue. The Montana Supreme Court itself has emphasized in another context that "'[t]he right of a defendant to have an action brought against him . . . in the county in which he has his residence is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions.'" *Hardenburgh v. Hardenburgh*, 115 Mont. 469, 146 P.2d 151, 153 (1944) (quoting *Brown v. Happy Valley Fruit Growers*, 274 P. 977, 979 (Cal. 1929)). Montana law further recogizes this fact by permitting interlocutory appeals, as in the underlying cases here, of denials of motions for change of venue.

The very fact that venue is often hotly contested proves that those who know best—trial lawyers and trial judges—treat it as a crucial matter. Moreover, in a case involving federal court venue, this Court has observed that "[i]n most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great West. United Corp.*, 443 U.S. 173, 183-84 (1979) (footnote omitted). Thus, discrimination among various classes of defendants with respect

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1988): "In cases that may be tried to a jury, it will be important to know something about the demographic characteristics of the population from which the jurors are likely to be drawn. Trial lawyers have their own ideas about the professional, social, economic and ethnic factors they like to see represented on a jury panel. Persons with the desired qualifications are more likely to be found in some locales than others."

to venue is discrimination in one of the fundamentals of civil litigation.

A. The Equal Protection Clause Forbids Real And Substantial Discrimination In State Court Venue

The effort of the court below to minimize the importance of venue appears to have been prompted by its reading of *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976). In that case, this Court distinguished *Saunders* and upheld a state venue law against an equal protection challenge.

On its face, the Texas statute in *Starnes* provided that out-of-state corporations could be sued in any county in the state in which they had an agent. Domestic corporations could be sued outside their county of residence only if they had an agent in that county *and* if the plaintiff could make a preliminary showing as to his or her cause of action. *Id.* at 638. In *Starnes*, an out-of-state corporate defendant complained of a lack of equal protection, on the theory that it was denied an early discovery tool that was available to domestic corporations:

> The gist of appellant's argument is that, because Exception 27 does not require that plaintiff demonstrate the existence of his cause of action, there was '[d]enied to appellant . . . a virtually unique opportunity afforded to domestic corporations, to preview its adversary's case in chief (except as to the extent of damages); to cross-examine plaintiff's witnesses as to the nature and existence of the alleged cause of action; to obtain from the Court a venue ruling which would, under the circumstances, be tantamount to a judicial assessment of plaintiff's cause of action; to nip a frivolous or baseless claim "in the bud," before it could escalate into a lengthy, complex and time-consuming lawsuit; and finally, to obtain, by demanding a jury trial of the venue facts, either an early trial on the merits or at least a preliminary assessment by a jury of the plaintiff's credibility.'

Id. at 642-43 (citation to brief omitted).

The constitutional claim in *Starnes* was limited to the alleged inequality in this proto-discovery feature of the statute. Petitioner there had not objected to, and the Court did not address, the aspect of the venue statute authorizing "broader venue geographically for suits against foreign corporations than for suits against domestic corporations." *Id.* at 645-46. Thus, the discriminatory effect presented in this case—the potential for rampant forum shopping that results from an any-county venue rule against certain defendants—was decidedly not at issue in *Starnes*.

In any event, the actual implementation of the statute by the Texas courts kept the statutory discrimination from becoming real and substantial. As was revealed during oral argument, the showing actually required of plaintiffs in cases against domestic corporations was merely a *prima facie* matter, quite easily satisfied in practice. *Id.* at 643. This meant in turn that there was little incremental discovery afforded to domestic corporate defendants in the process, and that the overall effect of the difference was negligible in light of the many and far more extensive discovery tools equally available to all litigants. *Id.* at 644. In this sense, *Starnes* was not even about quantitative or qualitative equality in discovery—it was only about parity in the timing of discovery.

Thus, the alleged discrimination which had brought the case before this Court evaporated during oral argument. Based on this eleventh-hour factual development, the Court observed that "[j]ust as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, . . . so may a statute discriminatory on its face be nondiscriminatory in its operation." *Id.* at 645 (citations omitted). The *Starnes* Court ultimately held that the case presented no significant discrimination against out-of-state corporations, and thus no equal protection violation. *Id.* at 643-45.

The outcome of *Starnes* is fully consistent with the holding in *Saunders*. *Starnes* stands only for the unre-

markable proposition that when apparent discrimination is eliminated by the state's actual implementation of a law, there is no violation of equal protection. In the context of venue statutes and their disparate potential for forum shopping, the true analogy to *Starnes* is a state law that distinguishes between residents and non-residents in the manner of the Montana statute, but also permits an out-of-state corporation to establish an in-state residence for purposes of venue. *See* cases cited *supra*, at 15 n.18. Such an interpretation was urged but rejected below. Pet. App. 5a-6a.

As a result, the discrimination effected by the Montana venue statute is very real, and cannot be avoided or mitigated by an out-of-state corporate defendant. Given the obvious logistical, tactical, and strategic disadvantages imposed by this type of double standard, the conclusion of the Court in *Saunders* is plainly applicable here.[37]

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[37] The decision below attached substantial weight to a footnote in Justice Brennan's opinion for the Court in *Starnes*, questioning the continuing vitality of *Saunders*. *Id.* at 645 n.6 (dicta). But that footnote certainly did not purport to overrule *Saunders*, and since then this Court has cited *Saunders* as authority in an equal protection case, confirming that it remains good law. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. at 664-65.

Nor did any of the cited cases attempt to overrule *Saunders*. In *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), the Court considered a statute that favored *non-residents* over residents and therefore did not raise the constitutional concern that local interests were using the state legislature to discriminate against out-of-state corporations. In *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580 (1935), the Court, far from discrediting *Saunders*, relied upon that decision as establishing the test for determining the constitutional validity of legislative discrimination. *Id.* at 583. Moreover, the statute at issue in *Brownell* was upheld because the foreign corporation failed to demonstrate it was similarly situated to a domestic corporation; only domestic corporations were required to maintain a guaranty fund with the state commissioner of insurance. *Id.* at 585. *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931), involved another situation, like *Snell*, in which a distinction in venue between individuals and corporations was held permissible.

B. The Montana Venue System Creates Real And Substantial Litigation Disadvantages For Out-of-State Corporations

Everything about the Montana venue statute—its divided structure, its plain language, and its interpretation in case law—discriminates between domestic and foreign corporations. Under MCA § 25-2-118, domestic corporations enjoy the privilege of being sued only in their county of selected residence or where the accident occurred. In contrast, any foreign corporation may be sued in any county selected by the plaintiff. In the give and take of civil litigation, this inequality has tremendous impact.

This double standard has the obvious effect, exactly as observed in *Saunders*, of imposing additional logistical burdens on out-of-state corporations in their Montana state court litigation. If the plaintiff may choose any county in Montana in which to litigate, then he or she gains tremendous tactical advantage over the defendant. In effect, defendant's witnesses—who will often include supervisors and corporate officers—can be held hostage at and around the time of the trial. This translates into increased settlement leverage and a substantial impact on the probable financial outcome of the case.

Foreign corporations are also affected in an even more dramatic way. They are subjected to open-ended forum shopping, whereas domestic corporations are protected from this phenomenon. The quantitative impact of this disparity is heightened by the "open door" policy maintained by Montana. *See supra*, at 4 & n.4 Under the Montana judicial system, an out-of-state corporation may be hauled into court in any Montana county, by an out-of-state plaintiff, represented by out-of-state lawyers, to respond to allegations of an out-of-state injury.

In fact, this is precisely what is happening to BN in Montana. As shown by the cases listed in Pet. App. 40a-44a, plaintiffs are going out of their way to bring

suit against BN in two selected Montana counties. In effect, the Yellowstone and Cascade County courts and their juries have become powerful magnets for FELA claims, drawing cases not only from all of Montana but from across the entire upper northwest region of the United States.

From all of the circumstances, it is manifest that BN is being subjected to a virulent form of forum shopping —one from which Montana's domestic corporations are immunized by state law. The effect of the Montana venue system is a blatant discrimination. In litigation such as the underlying cases here, the Montana corporation takes the defense with the guarantee of a "home field" advantage, in the county which it has selected as its residence. In contrast, the out-of-state corporation is compelled to defend itself in a court which has been selected by the plaintiff—after a wide-ranging exercise in forum shopping—as the one in which the largest jury verdict is likely to be obtained.

When plaintiffs' counsel are permitted to canvass an entire state in order to find a pro-plaintiff haven, there need be only one or two such courts out of dozens in the system in order for plaintiffs to secure a major litigating advantage. A disproportionate number of cases will be funneled into just those courts. In addition, the disadvantage of mounting a defense in a jury trial in such a forum is the greatest for an out-of-state corporate defendant, precisely the category singled out by the Montana venue law. Thus, the operation of this double standard for this selected category of litigants has a compound effect.

As this case perfectly demonstrates, litigants are skillfully exploiting the discriminatory provisions of the Montana venue law. Plaintiffs who take out-of-state corporations to court in Montana can take free advantage of idiosyncracies in the bench and jury venire in selected county courts, to the obvious disadvantage of these muti-

state businesses incorporated elsewhere. In Montana and other states with venue laws that discriminate against out-of-state corporations, the result can only be to exacerbate the exploding volume and cost of civil litigation. By any practical definition, the discriminatory effects of the Montana statute are both "real and substantial."

Furthermore, the operation of the forum shopping permitted by the Montana venue statute is closely related to the political dynamics of the equal protection violation. Few state legislators would be inclined to subject *all* defendants, including their own constituents, to unlimited forum shopping across the state. Local businesses would vehemently oppose such treatment and would surely vent their views on the state bench, bar, and legislature. Thus, laws permitting rampant forum shopping become far more viable from a political standpoint when local businesses are insulated from their effects. Lacking any legitimate purpose, Montana's open-ended venue rule is able to remain on the books only because it targets outsiders for disadvantageous treatment.

CONCLUSION

For these reasons, the Court should reverse the decision and order of the Supreme Court of the State of Montana.

Respectfully submitted,

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